

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)

Communications Assistance for Law)
Enforcement Act)

CC Docket No. 97-213

To: The Commission

COMMENTS OF POWERTEL, INC.

Powertel, Inc. ("Powertel"), by its attorneys, hereby respectfully submits its comments in the above-captioned proceeding in response to the Commission's Notice of Proposed Rulemaking ("NPRM").¹ Powertel, through its wholly-owned subsidiaries, holds numerous A, B, D and E block PCS licenses for markets throughout the southeastern United States. As a PCS licensee, Powertel has a direct interest in the rules which the FCC ultimately promulgates in conjunction with CMRS carrier compliance with the requirements of the Communications Assistance for Law Enforcement Act ("CALEA").

I. THE COMMISSION'S RULES MUST BE NARROWLY TAILORED TO ENSURE CALEA COMPLIANCE

The Commission should, in promulgating its rules, bear in mind that its intended role in

¹ In the Matter of Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, Notice of Proposed Rulemaking, released October 10, 1997.

CALEA is the implementation of rules which are "*necessary*"² to the implementation of CALEA. CALEA, while undeniably important to the efforts of law enforcement, was, in turn, intended to ensure that technological advances did not become obstacles to that effort. For example, CALEA, for the first time, requires that carriers modify their systems to facilitate surveillance. At the same time, the CALEA is careful to seek to maintain the protections afforded to the citizenry utilizing the carrier's facilities. While the Commission has sought comment on several areas, of primary concern to Powertel is that in implementing its rules, the FCC ensure that the resulting rules remain focused on furthering the expressed purposes of the CALEA while not creating a regulatory framework which is both unduly burdensome and focused towards pecuniary measures intended to ensure compliance.

A. The FCC Must More Clearly Define Which Telecommunications Services Fall Within The Scope of CALEA

The Commission concludes in the NPRM that "providers of exclusively information services, such as electronic mail providers and on-line services providers, are excluded from CALEA's requirements. . . ." NPRM ¶ 20. Some services currently being offered by telecommunications carriers blur the bright line distinction between telecommunications services and informational services. Powertel is a PCS carrier operating a system based upon the GSM protocol. That protocol combines numerous functions (such as telephony, voice mail, short message paging, and others) into a single system served by a common handset. Certain of those functions, such as the short message

² 41 U.S.C. § 229 (emphasis added).

paging functions, are more akin to an electronic mail and/or paging service than switched telecommunications traffic. Because the service offering of telecommunications carriers, particularly PCS carriers, are becoming more hybrid in nature, and because of the impingement upon the rights of subscribers and the potential liability of carriers, the FCC must take this opportunity to not only define the classifications of carriers which are to be subject to the CALEA requirements, but also the service offerings thereunder which are and are not subject to the system modification and surveillance requirements.

B. The FCC's Regulations Pertaining to Internal Corporate Policy and Procedure Must Be Limited in Scope

As the Commission is well aware, wireless carriers have long had an affirmative obligation to cooperate and assist law enforcement individuals in the conduct of their authorized surveillance. Powertel presently maintains a single point of contact within its organization through which all such surveillance is coordinated and controlled. Powertel suggests that this single point of contact constitutes the appropriate level of information which should be required to be made available to law enforcement officials. Powertel submits that the requirement to provide and continually update lists of individuals, along with their "date and place of birth, social security number, official title, and contact telephone and pager numbers," NPRM ¶ 33, is not only unduly burdensome but could lead to the very lack of internal carrier oversight which the FCC should seek to avoid.

Powertel presently operates five discrete switching centers and has hundreds of employees. These switching centers control cell sites which currently provide service over a nine-state territory which encompasses countless jurisdictions and law enforcement agencies. Employee turnover and

internal recategorization of job assignments in this large corporate environment, coupled with numerous law enforcement agency reporting requirements, would render compliance unduly burdensome under the FCC's proposal.

Significantly, the very reporting requirement being considered could lead to untold potential for abuse and unsupervised conduct of surveillance. Under Powertel's present system, the single point of contact has direct knowledge and control over any surveillance procedures which are undertaken by the company in compliance with subpoenas or court orders. The publication and distribution of an employee list with contact numbers would allow law enforcement officials to deal directly with those employees in the conduct of a particular surveillance, circumventing the corporate chain of command. Powertel submits that the sensitive nature and potential legal ramifications of every surveillance is such that every surveillance must be under the direct control of a single, high level Powertel official. While the information regarding the specific authorized employee who ultimately carries out the surveillance might well be appropriate to include in the internal records of the carrier and, subsequent thereto, made available to the appropriate law enforcement officials, the advance distribution and maintenance of a complete employee list is both burdensome and potentially subject to abuse if a law enforcement official were to seek to contact an employee directly for the conduct of a surveillance. Indeed, absent the intent to contact any such employee directly, the reason for disclosure of direct contact numbers in advance to law enforcement individuals is unclear. The internally-controlled procedures suggested herein would appear to be more consistent with the Section 105 obligation placed upon the *carrier* to ensure that only lawful interceptions will occur.

The Commission also requests comment on the definition of "appropriate authorization," in the context that "carriers' employees are required to receive 'appropriate authorization' prior to assisting law enforcement officials in implementing electronic surveillance." NPRM ¶ 25. In the event the Commission declines to adopt Powertel's proposal regarding a single point of contact, at a minimum the Commission must define "appropriate authorization" as the authorization that a carrier's employee needs from the carrier to engage in interception activity. NPRM ¶ 25. This will ensure that, at least from the carrier's perspective, all surveillance is conducted in accordance with corporate policies and procedures.

C. The FCC Must Avoid Placing the Carrier or Its Employees in the Position of Determining the Appropriateness of the Request for Surveillance

While CALEA is intended to be more restrictive upon law enforcement officials in their ability to institute surveillance,³ Powertel is concerned over the statutory reference to "other lawful authorization" as the basis upon which the carrier must assist the law enforcement official. In the case of current subpoena, warrant, court order, the issuance of such by an appropriate court or magistrate provides the carrier with assurance that the "lawfulness" of the requested authorization has been passed upon by a magistrate of competent jurisdiction. In sharp contrast, the NPRM appears to be shifting the responsibility to the carriers to establish procedures regarding what carrier personnel must receive "before assisting law enforcement officials implementing electronic surveillance." NPRM ¶ 29. Because CALEA applies only to "lawful" surveillance, Powertel submits

³ See NPRM ¶ 29 (discussing electronic surveillance availability only in felony cases).

that the carrier should not be responsible for determining what constitutes "other lawful authorization" and strongly urges the FCC to adopt formal guidelines as to what a carrier may and may not rely upon in complying with a request for surveillance absent a "court order." Indeed, given the carrier's responsibility to avoid "unlawful" interceptions, it is incumbent upon the FCC to expressly define what is and is not "other lawful authorization." The Commission should adopt rules which categorically protect a carrier from liability in the event that it complies with established FCC guidelines and allows surveillance to proceed based upon apparent "other legal authorization" whether or not that other authorization is ultimately found to have been sufficient.

II. THE COMMISSIONS MUST NOT IMPUGN VICARIOUS CRIMINAL LIABILITY TO CARRIERS FOR THE CONDUCT OF THEIR EMPLOYEES.

The Commission must be extremely careful in extending vicarious criminal and/or civil liability to a carrier based solely upon the conviction of one of its employees for CALEA violations. First, the fact that an employee of a carrier is convicted for a violation of the statute does nothing to speak to the carrier's intent or efforts to ensure compliance with the CALEA. In virtually every instance, an errant employee may act in a clandestine manner, contrary to the expressed instructions of its employer. The conviction of an employee of willful misconduct, unless such acts were under and consistent with the expressed instructions of the carrier, cannot be impugned to form any act or intent of wrongdoing on the part of the carrier. Indeed, the FBI has sought to have the FCC impose upon a carrier the obligation to report any violation of its security policies and procedures. NPRM ¶ 27. While Powertel supports a reporting requirement and internal policing because it furthers the intent of CALEA, Powertel views the effort to expand the resultant liability for individual

misconduct as clearly beyond the Congressional intent with respect to this matter.

III. THE FCC SHOULD CONSIDER ADOPTING MODEL PROCEDURES WHICH CARRIERS COULD ADOPT WITHOUT FURTHER FCC REGULATION.

Powertel submits that the underlying purpose of the CALEA would be furthered, and the burden on carriers and on scarce Commission resources minimized, if the FCC were to adopt model procedures and reporting policies which carriers could implement. Although Commission approval would be necessary for terms that differ from the Commission's model, this scheme would greatly benefit both telecommunications carriers and the Commission. The benefit to the carriers is that they obtain FCC guidance in establishing their internal policies and procedures for CALEA compliance. The benefit to the FCC is two-fold. First, in establishing model guidelines, the Commission will be able to guide the development of carrier-specific policies and procedures by providing a framework which the carriers know will satisfy their legal obligations. Secondly, the FCC's burden of CALEA compliance review will be substantially reduced because the FCC will not have to evaluate thousands of independently derived policies and procedures. Consequently, Powertel requests the Commission to consider adopting model procedures for CALEA compliance.

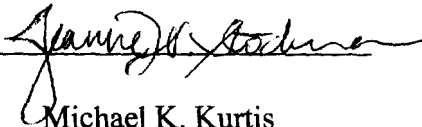
IV. CONCLUSION

Powertel views some of the proposed rules regarding CALEA implementation as overly broad and impermissibly vague. Powertel requests the Commission to revisit the scope of the rules addressed herein to promote the efficient implementation and operation of CALEA. Further, the Commission should not impugn vicarious criminal liability to carriers for the conduct of their

employees. Finally, adoption of model procedures for CALEA implementation would benefit both carriers and the Commission.

Respectfully submitted,

POWERTEL, INC.

By: 
Michael K. Kurtis
Jeanne W. Stockman

Kurtis & Associates, P.C.
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 328-4500

Dated: December 12, 1997

Its Attorneys